

Judicial Embrace of Alternative Dispute Resolution Continues: Federal and State Courts Expand Arbitration's Scope, Mediation Programs

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Since 2001, the United States Supreme Court has issued six major decisions which are favorable to arbitration of disputes and expand the scope of an arbitrator's authority to decide issues. Recently, the New Hampshire Supreme Court has taken its Rule 170 mediation program statewide and made it mandatory for all cases. In support of this change, Chief Justice Broderick has said that the court system must offer effective and flexible alternative dispute resolution options to remain relevant.

This judicial trend fostering alternative dispute resolution (the umbrella term for arbitration, mediation and other forms of non-judicial resolution) is indisputable and dramatic. The courts' embrace of ADR is also quite ironic because both the federal and New Hampshire arbitration statutes were passed in the 1920's in response to judicial hostility to arbitration

ARBITRATION

The Federal Arbitration Act ("FAA"), and the state statute, RSA 542, codify the enforceability of arbitration agreements by the courts, and provide for a narrower standard of judicial review than court appeals. The goal of arbitration is to provide a streamlined, less costly and faster dispute resolution mechanism.

While arbitration of workplace issues under negotiated union contracts has flourished since the 1930's, one of the big unanswered ADR questions of the 20th century was whether employers could require non-union employees to arbitrate employment cases, including statutory discrimination claims, absent an individual employment agreement with the employee. This question was finally answered in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001), where the Supreme Court ruled that an arbitration provision in a job application signed by an employee was enforceable and that an employee in such circumstances could be required to arbitrate in lieu of a jury trial.

In a subsequent decision, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the court clarified that *Circuit City* did not apply to statutory actions commenced by a state or federal agency such as the EEOC because the agency is not a party to the employee's terms and conditions of employment with the employer. *Green Tree Financial Corporation-Alabama v. Randolph*, 531 U.S. 79 (2000) made clear that a party objecting

to arbitration has the burden of proving that the agreement is unconscionable for cost or other reasons.

In the highest court's next term, it will decide its fourth employment arbitration case since 2001. In February, the Supreme Court agreed to hear *Pyett v. Pennsylvania*, 498 F.3d 88 (2d Cir. 2007), cert. granted, 128 S.Ct. 1223 (Feb. 19, 2008), which presents the related issue of whether a union can agree in collective bargaining that the employees it represents will arbitrate statutory claims instead of going to court. Some observers believe that *Pyett* may provide the Supreme Court a vehicle to reverse its decisions dating back to 1974 holding that such union contract clauses are not enforceable.

The line of recent pro-arbitration Supreme Court decisions also includes *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) resolving the question of whether the court or an arbitrator rules on a challenge to the legality of the contract. The lower courts had ruled that such legal issues were for a court. The Supreme Court disagreed holding that since the challenge did not concern the existence of a contract to arbitrate, the question of unenforceability under Florida usury laws was one for the arbitrator to decide. Justice Scalia, writing for the majority, stressed that as a matter of federal law, arbitration provisions have viability apart from the remainder of a contract, and that the FAA applies in state as well as federal court.

This year has already brought us two more Supreme Court decisions favorable to arbitration. *Preston v. Ferrer*, 128 S.Ct. 978 (2008) arose out of a contract between a Fox-TV personality "Judge Alex" (Ferrer) and his manager (Preston) containing a standard arbitration clause incorporating the rules of the American Arbitration Association ("AAA"). Judge Alex filed with the California Labor Commissioner under a state talent agent licensing statute seeking to void the contract because Preston was unlicensed. He was successful in the state courts in having arbitration enjoined pending a hearing at the Labor Department. Preston then appealed.

The U.S. Supreme Court overturned the California courts, relying on *Buckeye*. The Court held that the FAA preempts such state statutes and that, in an employment context, the arbitrator and not the Labor Commissioner should resolve the question of whether the agreement was enforceable. During oral argument, Justice Souter noted that a contrary ruling "would virtually destroy the value of arbitration.... [as]one of the points of arbitration is to get the ball rolling." The N.H. Department of Labor had reached the same conclusion two years earlier ruling that, it will defer to arbitration provisions in wage claim and whistleblower cases. See e.g. *Ramirez v. Avis Goodwin Health Center* (McDonough 2006).

On March 25, the Supreme Court decided *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008) settling a split in the circuits as to whether the parties can expand the FAA's narrow scope of judicial review of arbitration awards (generally limited to fraud, corruption, arbitrator misconduct or exceeding arbitral powers granted by the contract). The Court determined that the scope of review was confined to the grounds in the FAA. Thus, even though arbitration is created by contract and parties can choose the kind of arbitration procedure they want before seeking judicial review, they cannot change the court's limited review role under the statute once they agree to arbitrate. Justice Souter

authored the Court's opinion, noting that "such limited review [is] needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 1398.

Plaintiffs often raise legal arguments to try to keep their case in court, particularly in consumer and employment cases. Frequent contentions include that there was no enforceable agreement reached, or that the contract was unconscionable. Most of these arguments have not succeeded, particularly in the First Circuit which has gone out of its way to salvage arbitration provisions by severing an offending clause or reforming the contract to correct the problem. See e.g. *Anderson v. Comcast Corp.*, 500 F.3d 66 (1st Cir. 2007) (court struck one year filing deadline in contract and substituted four year statutory limit); *Skirchak v. Dynamics Corp.*, 508 F.3d 49 (1st Cir. 2007) (court finds class action waiver in employer promulgated dispute resolution program unconscionable under facts of case, but allows FLSA claims to proceed to arbitration after striking the offending clause).

The most frequent challenge to arbitration of claims in employment cases is unconscionability of the terms of the employer plan or the way it was implemented/communicated to the workforce. See *Skirchak*, *supra*. The plans that have fared best in the face of judicial challenge by parties who would rather be in court are ADR provisions administered by the American Arbitration Association ("AAA") under its rules. (For an extreme example of unconscionable overreaching in imposing dispute resolution terms on a workforce (ironically by a large law firm employer), see *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007)).

Founded in the 1926, AAA is the largest provider of ADR services in the world. Before it will administer an employer mandated plan (as opposed to a contract to arbitrate), AAA requires the plan to be submitted for its review to ensure compliance with its rules and due process protocols. For example, the AAA Rules for Resolution of Employment Disputes (available along with a wealth of other useful materials for practitioners at www.adr.org), require that the process be for an impartial arbitrator as opposed to one picked by the employer. They also provide that the employee be allowed representation of their choosing (at their expense), that the employee can pursue all the same legal and statutory claims and remedies they could in court, that there be no unfair restriction on the site of the hearing and that the employee's filing fees be limited to approximately what they would be in court.

Procedures for fair and adequate discovery under the supervision of the arbitrator must be included, but discovery does not have to be as extensive as in court. This, along with private hearings without media coverage, and scheduling certainty, is often cited as one of the major advantages of arbitration.

MEDIATION

Our Federal District Court has had a mediation program with a list of approved mediators in place for years, and the New Hampshire Supreme Court has also been active on the ADR front. 2007 brought us two state decisions favorable to alternative dispute resolution. See *In re Merrimack County*, 156 NH 35 (2007) (claim that arbitrator exceeded authority under contract rejected because employer argued the issue in question to the arbitrator);

State v. Philip Morris USA, Inc., 155 N.H. 598 (2007) (broad arbitration clause gives rise to presumption that dispute is arbitrable).

The most dramatic ADR developments in our state are the changes to the Superior Court Rule 170 program. As of January 2008, participation in ADR is mandatory in all counties and parties may choose mediation, neutral evaluation or binding arbitration. Over 170 New Hampshire attorneys have signed up to serve as neutrals in the revamped program. The parties may also now choose their neutral from court vetted and trained mediators and arbitrators. The list is available on the newly established Office of Mediation and Arbitration (OMA) website at <http://www.courts.state.nh.us/adrp/index.htm>. This list can also be used by parties and counsel to find and select a mediator before even initiating suit. The new rules also give the parties the choice of a volunteer mediator or one that they select and hire directly from the list by mutual agreement. In the near future, the OMA plans to post a separate list of highly skilled arbitrators whose credentials will be available online.

Karen Borgstrom, Director of the OMA, has worked hard to launch these initiatives and is pleased with the support her office is receiving from in and outside the court system. She notes that "the changes to the Rule 170 program now make it possible for attorneys and parties to have substantial control and flexibility in determining how ADR can be used most effectively in their cases."

CONCLUSION

There is no question that the state and federal courts through decisions and rulemaking are fostering alternative dispute resolution. In view of these trends, parties and counsel should actively consider mediation and arbitration options when drafting agreements and embarking on litigation.

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